STATE OF MICHIGAN

COURT OF APPEALS

SOUND AROUND, INC., Plaintiff/Counter-defendant-Appellee,	UNPUBLISHED April 27, 2001
v	No. 219295 Oakland Circuit Court
MIDWEST ELECTRONICS, INC., Defendant/Counter-plaintiff-Appellant.	LC No. 97-5528484-CK

Before: Talbot, P.J., and Doctoroff and White, JJ.

PER CURIAM.

Defendant appeals as of right the final judgment and denial of its motion for new trial in this breach of contract and breach of warranty action. Following a bench trial, plaintiff was awarded $28,630.00, less a set-off of $14,183.00 for defective product, and defendant was awarded $20,000 on its counterclaim. We affirm.

Plaintiff Sound Around, a New York corporation, sells electronic equipment. Defendant (Midwest), a Michigan corporation, sells electronic equipment and installs audio equipment in new and used vehicles at car dealerships. Plaintiff's complaint alleged that defendant owed it $36,089.61 for merchandise it delivered to defendant before January 29, 1997. Defendant denied liability and counterclaimed, alleging that plaintiff sold it defective goods, and thereby was in breach of contract, and breached express and implied warranties causing defendant damages. Defendant alleged that approximately five-hundred CD changers were defective, some of which had been installed in customers' vehicles, and that it incurred substantial repair costs and suffered customer dissatisfaction as a result, that a substantial portion of its business arises from the sale and installation of audio equipment at auto dealerships, and that it had lost substantial sales and installation earnings at two auto dealerships, and had not been allowed to sell or install further equipment at one dealership.

The two-day bench trial began on December 21, 1998. Abe Herbst, secretary of Sound Around since 1992, testified for plaintiff that Sound Around sold CD changers and players to defendant on an open account basis, sent an invoice with each shipment, and monthly statements. Herbst testified that defendant had a current balance of $28,630.27, as plaintiff had credited

$3,753.70 and $3,705.64 to defendant in September and October 1997. Herbst testified that he was not aware that any contracts existed pertaining to invoice sales to defendant. Herbst testified that defendant had been credited for all returns.

Anthony Cicerone, defendant's president since 1981, testified for defendant that he began doing business with plaintiff in 1995 because of the five-year warranty[1] plaintiff offered on Legacy brand name CD changers, plaintiff's high-end product. Cicerone testified that a five-year warranty was extremely unusual, and that Midwest needed to warranty its product with its car dealers for three-years/36,000 miles. Cicerone testified that Midwest sold the CD changers to approximately thirty auto dealerships and that every one of them contacted Midwest regarding problems. Southfield Chrysler Plymouth was the largest of the dealers, and Lochmoor Chrysler Plymouth was another dealer experiencing problems. Cicerone testified that several other dealerships had problems and made "very boisterous" complaints to Midwest. He testified that Midwest would dispatch an installer to either the customer's home or office or to the dealership service department to investigate reported problems, and either repair or replace the product. Midwest had twelve installers at the time who were paid on commission, and currently has seven. Initially, Midwest replaced the defective Legacy CD changers with other Legacy changers, because Sound Around assured Midwest the product was fine, but the replacements were also defective. Midwest then started replacing the Legacy product with Panasonic CD changers.

Cicerone testified that Southfield Chrysler Plymouth stopped purchasing CD changers from Midwest altogether, although it continued to buy car alarms. Southfield Chrysler Plymouth was purchasing approximately three hundred changers a month when Midwest lost its business in 1996; Cicerone testified that Midwest never got that dealership's CD-changer business back. He testified that Midwest lost sales at all other dealerships for a time, but over the years got "most of the business back from them." Cicerone testified that Midwest lost approximately $1.5 million in net profit because of the lost business.

Defendant also called Gary Wilkinson, who testified that when he was vice president at Sound Around he dealt with Midwest and Cicerone. Wilkinson testified that some of the products defendant returned to plaintiff had defective components, but that plaintiff was never able to determine what the complete problem was. On cross-examination, Wilkinson testified that the normal return rate for defective product is 1 to 5%. He agreed that Midwest purchased

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[1] The Legacy written warranty was admitted at trial and stated:

> Legacy Audio Corporation warrants this unit to be free from defective material or workmanship and will repair or replace this unit or any part thereof if it proves defective in normal use or service within five (5) years from the date of the original purchase.
>
> Our obligation under this warranty is limited to the repairing or replacing, at our discretion, the defective instrument or any part thereof when it is returned, transportation prepaid to the Legacy Service Center at the address below . . . .

about 3,200 CD changers and claimed about 473 were defective, or about 15%. Wilkinson testified that the types of damages Midwest was claiming were not foreseeable. He did not recall Midwest signing a contract with plaintiff, and testified that no writing indicated that plaintiff would pay lost profits or loss of reputation if defective product was returned to it.

I

Defendant first argues that the trial court erred when it barred defendant's only expert from testifying at trial. Under the circumstances presented here, we disagree.

We review the trial court's decision to bar an expert witness as a discovery sanction for abuse of discretion. *Dean v Tucker*, 182 Mich App 27, 31-32; 451 NW2d 571 (1990). *Dean, supra*, sets forth a non-exhaustive list of factors to be considered in determining an appropriate sanction for a party's failure to timely disclose the identity of witnesses, including experts, expected to testify at trial:

> (1) whether the violation was wilful or accidental; (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses); (3) the prejudice to the defendant; (4) actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice; (5) whether there exists a history of plaintiff's engaging in deliberate delay; (5) the degree of compliance by the plaintiff with other provisions of the court's order; (7) and attempt by the plaintiff to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice. [*Dean, supra* at 32-33.]

MCR 2.401(I) provides in pertinent part:

> (1) No later than the time directed by the court under subrule (B)(2)(a), the parties shall file and serve witness lists. The witness list must include:
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> (a) the name of each witness, and the witness's address, if known; however, records custodians whose testimony would be limited to providing the foundation for the admission of records may be identified generally;
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> (b) whether the witness is an expert, and the field of expertise.
>
> (2) The court may order that any witness not listed in accordance with this rule will be prohibited from testifying at trial except upon good cause shown.

A

Defendant's witness list named "[a] representative from Plante Moran, P.L.L.C.," did not identify any of the witnesses as experts, and stated that defendant reserved the right to amend or supplement its witness list, as discovery was ongoing. In response to plaintiff's interrogatories requesting information regarding witnesses, defendant objected on the grounds that discovery was continuing, and that it had not yet determined witnesses it would call at trial, but stated that it "will provide such information as is currently required by the scheduling order in this case and/or any subsequent orders defining the due date for the designation of witnesses." Defendant

stated, without waiving objections, that Anthony Cicerone would testify regarding the transactions giving rise to this action, the relationship between the parties, and the effect the defective equipment plaintiff sent to defendant had on defendant's reputation and its business.

Defendant did not supplement its discovery responses at any time. Discovery closed on April 19, 1998. The case was initially scheduled for trial on August 3, 1998,[2] but trial was adjourned until December 1998. The parties agreed to submit the case to facilitation in that interim period. By motion filed on December 2, 1998, defendant requested trial be adjourned for sixty days in order to allow it and its experts to further prepare. In response to that motion, plaintiff argued that defendant could not call any expert witnesses as it had no notice of them and would be prejudiced thereby. At the December 6, 1998 hearing on defendant's motion to adjourn, plaintiff's counsel made clear that it would oppose defendant calling any expert, as defendant had failed to identify any such expert and discovery was closed. The circuit court denied defendant's motion for adjournment.[3]

Before opening statements on December 21, 1998, plaintiff's counsel orally moved to preclude defendant's expert from testifying. The trial court did not allow the Plante Moran CPA to testify, noting that the case had been set for trial before and that naming an expert for the first time two weeks before trial, and months after discovery closed, was improper.

Defendant does not dispute that plaintiff first learned of the Plante Moran expert's name two weeks before trial began. Although the record supports defendant's arguments that plaintiff did not file a motion to compel, did not file a motion to strike the Plante Moran witness, and did not take any depositions, defendant provides no explanation for its failure to supplement its witness list and interrogatory answers and failure to name the expert until two weeks before trial. Nor does defendant support its argument that MCR 2.401 does not bar a party "from listing limited liability companies as witnesses," or that such a practice would be permissible under the circumstances presented here, i.e., where it did not identify the expert by name until two weeks before trial, and never supplemented interrogatories addressed to the substance of the witness' testimony. Nor does the record support defendant's argument that the trial court allowed plaintiff to "ambush" Midwest on the day of trial. Plaintiff's counsel made clear at the hearing on defendant's motion to adjourn trial that she would oppose defendant calling any expert.

Defendant relies on *Dean, supra,* and *VanEvery v SEMTA,* 142 Mich App 256; 369 NW2d 875 (1985), for its argument that barring its expert witness was too drastic a sanction. *VanEvery, supra,* is factually distinguishable from the instant case. In *VanEvery,* the plaintiff's physical injuries were at issue. The defendant was allowed to call one of the plaintiff's treating physicians to testify at trial, even though the defendant's witness list did not specifically name that doctor. In upholding the trial court's determination to allow the testimony, this Court noted

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[2] The August 3, 1998 transcript indicates that the parties were in settlement negotiations. On August 4, 1998, counsel stated they had not settled the case, the trial court adjourned trial for ninety days, and the parties agreed to submit the case to facilitation in sixty days.

[3] The case was handled pre-trial by the assigned circuit judge, who denied the adjournment. A visiting judge presided over the trial, beginning on December 21.

that the defendant had informed the plaintiffs that it intended to call "plaintiff's treating and examining doctors," that the plaintiffs' counsel had identified the doctor by name as a treating physician in answers to interrogatories and thus were on notice that the doctor was a treating physician, and that the plaintiffs in their witness list had reserved the right to call all witnesses indicated in their answers to interrogatories and depositions. *Id.* at 262.

Unlike in *VanEvery*, plaintiff in the instant case was not impliedly on notice concerning the witness' testimony. Defendant in answers to plaintiff's interrogatories requesting the names and expected trial testimony of witnesses identified only Cicerone. Defendant stated in response to plaintiff's interrogatories that it would supplement its answers, but it never did. Defendant could have supplemented its answers to plaintiff's interrogatories to indicate that it expected to call a Plante Moran representative to testify at trial regarding damages, and that it would identify the individual by name at a later date, but did not do so. Under these circumstances, we conclude that the trial court did not abuse its discretion in striking defendant's expert. *Dean, supra*.

II

Defendant next argues that the trial court erred when it failed to allow defendant a reasonable adjournment so that a crucial witness could arrive to testify.

This Court reviews the trial court's denial of defendant's request for an adjournment for abuse of discretion. *Zerillo v Dyksterhouse,* 191 Mich App 228, 230; 477 NW2d 117 (1991). The adjournment of trials is governed by MCR 2.503, which provides in pertinent part:

> (B) **Motion or Stipulation for Adjournment.**
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> Unless the court allows otherwise, a request for an adjournment must be by motion or stipulation made in writing or orally in open court based on good cause.
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> * * *
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> (C) **Absence of Witness or Evidence.**
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> (1) A motion to adjourn a proceeding because of the unavailability of a witness or evidence must be made as soon as possible after ascertaining the facts.
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> (2) An adjournment may be granted on the ground of unavailability of a witness or evidence only if the court finds that the evidence is material and that diligent efforts have been made to produce the witness or evidence.

On the afternoon of the second day of trial, after Cicerone and Wilkinson testified for defendant, the trial court went off the record. Once back on the record, the following occurred:

> THE COURT: I want to make it clear that I gave you extra time. This witness [Paul Steele] was suppose [sic] to be here to testify today, and the scheduling of witnesses is your concern, not mine. I'm most anxious to get this trial finished today, and we have some considerable work to be done. As I told you before, I have to have time to read and review the evidence and to write my opinion, and it

> does take time. I will give you my opinion before the end of the day here in court on the record. I won't give you a written opinion because I don't have anybody to type opinions, but I will give you my opinion on the record, and you can always get a copy of it from the court reporter.
>
> (Off the record.)
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> THE COURT: We had a 25 minute break in waiting for that witness.
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> MS. DIDOROSI: We appreciate the Court's attempt to help us.
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> THE COURT: We'll have to proceed without him.

The trial transcript indicates that neither the court nor defense counsel knew that Steele had arrived at the courthouse during closing arguments. Defense counsel first so stated in the motion for new trial, which stated that Steele not been able to find the courtroom once he arrived.

As the trial court noted at the hearing on defendant's motion for new trial, Steele was supposed to have appeared at 8:30 that morning, and was still not there in the afternoon after Cicerone and Wilkinson testified, or after plaintiff's counsel argued a motion for directed verdict. The trial court at that point took a twenty-five minute break to allow Steele to arrive, but he did not. The record supports that defendant did not establish good cause for an adjournment. We conclude that the trial court's denial of an adjournment was not an abuse of discretion.

III

Defendant next argues that the trial court erred when it ruled that no contract existed between the parties, thereby barring recovery on defendant's breach of contract claim.

Defendant's alleged injuries arise out of a "transaction in goods" and are thus governed by the UCC. *Neibarger v Universal Cooperatives*, 439 Mich 512, 533; 486 NW2d 612 (1992), citing MCL 440.2102; MSA 19.2101. Where a party "seeks to recover for economic loss caused by a defective product purchased for commercial purposes, the exclusive remedy is provided by the UCC." *Neibarger, supra* at 528. "Damages available to a buyer as compensation for a seller's breach under the UCC 'are intended to place the injured party in as good a position as he would have been in had the promised performance been rendered.'" *Sulllivan Industries, Inc v Double Seal Glass Co, Inc*, 192 Mich App 333, 346; 480 NW2d 623 (1991).

Remedies available to a buyer for a breach **with regard to accepted goods** are set forth in MCL 440.2714; MSA 19.2714, which provides:

> (1) Where the buyer has accepted goods and given notification he may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.
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> (2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value

> they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.
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> (3) In a proper case any incidental and consequential damages under the next section may also be recovered.

MCL 440.2715; MSA 19.2715 provides:

> (1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expenses incident to the delay or other breach.
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> (2) Consequential damages resulting from the seller's breach include
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> (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
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> (b) injury to person or property proximately resulting from any breach of warranty.

Contrary to defendant's argument, the trial court did not foreclose defendant's recovery of lost profits and loss of reputation on the basis that there was no express contract; rather, the trial court ruled that those categories of damages were appropriately considered in the instant case as flowing from plaintiff's breach of implied warranty, but that defendant had not established entitlement to such damages by a preponderance of the evidence.

It is clear from the trial court's opinion that it recognized a contract for the sale of goods subject to the UCC and the express warranty regarding replacing defective goods. The trial court's statement that "there was no evidence of an express contract and no evidence to support the filling of an implied contract," can only be understood as stating that there was no separate express or implied contract other than that involved in the sales under the UCC and the express warranty. The trial court's conclusions are supported by the record. There was no testimony to support that the parties had any agreement other than that plaintiff's sales to defendant would be on "open account," i.e., invoice by invoice. Defendant does not address the trial court's findings that the evidence submitted at trial of lost profits and reputation was speculative, apart from arguing that the court should have permitted the Plante & Moran witness to testify and should have waited longer for Mr. Steele to appear, arguments we have rejected.

Defendant's argument that the court should have required plaintiff to produce its president, Zigmund Brach, also fails. Defense counsel's offer of proof at trial supports the court's conclusion that Brach's testimony was unnecessary, as it would have been largely duplicative of Wilkinson's and Cicerone's testimony. Defendant does not describe what contract existed separate and apart from the contract of sale recognized by the trial court. Nor does defendant describe how Brach would have supported the existence of such a contract. Rather,

defendant seems to be differentiating between the types of damages available depending on how the claim is framed, implying that broader damages would have been recognized had the court expressly found a straight breach of contract. However, as stated above, the court did not reject any broad category of damages as unavailable, except the shipping charges, as contrary to the express warranty. Rather, the court found that the damages claimed were not supported by the proofs. Thus, defendant appears to have suffered no prejudice from the court's refusing to compel Brach's attendance.

Affirmed.

/s/ Michael J. Talbot
/s/ Martin M. Doctoroff
/s/ Helene N. White